Tentative Rulings for September 8, 2016
Departments 402, 403, 501, 502, 503

There are no tentative rulings for the following cases. The hearing will go forward on these matters. If a person is under a court order to appear, he/she must do so. Otherwise, parties should appear unless they have notified the court that they will submit the matter without an appearance. (See California Rules of Court, rule 3.1304(c).)

The court has continued the following cases. The deadlines for opposition and reply papers will remain the same as for the original hearing date.

15CECG00120 ***Dhaka Hoteliers, LLC v. Uddin and Ahmed*** **is continued to Tuesday, September 13, 2016 at 3:30 p.m. in Dept. 503.**

16CECG00480 ***Talesfore v. Clovis Auto Cars dba Clovis Volkswagen*** **is continued to Tuesday, September 13, 2016 at 3:30 p.m. in Dept. 503.**

16CECG00653 ***State of California v. Lamoure's Incorporated*** **is continued to Thursday, September 15, 2016, at 3:30 p.m. in Dept. 501.**

14CECG01754 ***Habbas v. Family Tree Media Group*** **is continued to Tuesday, September 13, 2016 at 3:30 in Dept. 402.**

15CECG01097 ***Perez v. Ford Motor Company*** **is continued to Tuesday, September 13, 2016 at 3:30 in Dept. 502.**

16CECG01910 ***Sanchez et al. v. Clovis Auto Cars*** **is continued to Tuesday, September 13, 2016 at 3:30 in Dept. 503.**

(Tentative Rulings begin at the next page)

Tentative Rulings for Department 402

(29)

Tentative Ruling

Re: ***Sotero Olivan v. Roger Jesse Bailey, et al.***
Superior Court Case No. 15CECG01035

Hearing Date: September 13, 2016 (Dept. 402)
If oral argument is requested by 4 p.m. 9/7/16, it will be held on the above date at 3:30 p.m.

Motions: Compel; deem admissions admitted; sanctions

Tentative Ruling:

To grant Defendants' motion to compel Plaintiff to provide initial verified responses to form interrogatories, set one, and request for production of documents, set one. (Code Civ. Proc. §§ 2030.290(b), 2031.300(b).) Plaintiff to provide complete verified responses to all discovery set forth above, without objection, within 10 days of the clerk's service of this order.

To deny Defendants' motion to deem admitted the matters within Defendants' request for admissions. (Code Civ. Proc. §2033.280(c).)

To grant Defendants' motion for sanctions. Plaintiff is ordered to pay monetary sanctions to Miller & Ayala, LLP, in the amount of $560 within 30 days of the clerk's service of this order. (Code Civ. Proc. §§ 2023.010(d), 2030.290(c), 2031.300(c).)

Explanation:

In the case at bench, Defendants served form interrogatories, set one; request for admissions, set one; request for special interrogatories, set one; and request for production, set one, on Plaintiff by mail, on May 5, 2016. (Decl. of Miller, ¶2.) As of the date of filing the instant motions, Defendants had not received Plaintiff's verified responses. (Id. at second ¶3.)

Motion to Compel:

A party that fails to serve a timely response to a discovery request waives "any objection" to the request. (Code Civ. Proc. §§ 2030.290(a), 2031.300(a).) The propounding party may move for an order compelling a party to respond to the discovery request. (Code Civ. Proc. §§ 2030.290(b), 2031.300(b).)

Where responses are served after the motion is filed, the motion to compel may still properly be heard. (*Sinaiko Healthcare Consulting, Inc. v. Pacific Healthcare Consultants* (2007) 148 Cal.App.4th 390, 409.) Unless the propounding party takes the

matter off calendar, the court may determine whether the responses are legally sufficient, and award sanctions for the failure to respond on time. (*Ibid*.)

Here, Plaintiff states that he does not oppose Defendants' motion to compel (Opp., 1:23-24, 2:5-6), and that he *anticipates* service of all outstanding discovery on Defendants prior to the hearing on the motion. (Id. at 2: 6-8.) Confusingly, Plaintiff also states that he "has produced the outstanding discovery thereby making the motion moot" (Opp., 1: 26-28), indicating that he *has served* his responses to Defendants' interrogatories and request for production of documents.

As discussed in *Sinaiko*, supra, 148 Cal.App.4th at pp. 407-409, an untimely response to a discovery request does not divest the trial court of the authority to hear a motion to compel responses, and to grant same so that the propounding party obtains the responses to which it is entitled, i.e., complete responses without objection.

There is no evidence before the Court that Plaintiff has served the requested discovery, or that same was complete, verified or in substantial compliance with the applicable statutory requirements. Accordingly, the motion to compel is granted.

RFAs:

Where a party fails to timely respond to a propounding party's request for admissions, the court must grant the propounding party's motion requesting that matters be deemed admitted, unless it finds that the party to whom the requests were directed has served, prior to the hearing on the motion, a proposed response that is substantially in compliance with Code of Civil Procedure section 2033.220. (Code Civ. Proc. §2033.280(c); see also *St. Mary v. Superior Court* (2014) 223 Cal.App.4th 762, 778.) Where the responding party serves its responses before the hearing, the court "has no discretion but to deny the motion." (*Id*. at p. 776.)

In the case at bench, Plaintiff opposes the motion to have matters deemed admitted on the ground that he "has prepared verified responses to Defendants['] admissions requests thereby making the request to deem admitted improper and not properly before this court." (Opp., 1:26-28.) Plaintiff represents further that the responses "substantially comply to [sic] [Defendants'] admissions requests[.]" (Id. at 2:26.) Plaintiff seems to misconstrue the substantial compliance requirement. Responses to requests for admissions must be in substantial compliance with Code of Civil Procedure sections 2033.210, 2033.220 and 2033.230 (see Code Civ. Proc. §2033.280(a)(1)), not the propounding party's requests. Moreover, having prepared verified responses is not, alone, sufficient to defeat a motion to deem matters admitted or render the motion improper, the responses must actually be served.

Plaintiff goes on to state that he has, in fact, served his responses on Defendants. (Opp. 2: 25-26.) Mr. Oviedo's declaration states that Plaintiff's responses to Defendants' request for admissions were served by mail on August 24, 2016. Plaintiff provides a proof of service of same. Accordingly, the motion to deem matters admitted must be denied.

Sanctions:

The court must award sanctions against a party or attorney who unsuccessfully makes or opposes a motion to compel, unless the court finds that circumstances would make such unjust. (Code Civ. Proc. §2030.290(c).) A party's failure to timely respond to requests for admissions results in a mandatory sanction. (Code Civ. Proc. §2033.280(c); see also Cal. Rules of Court, rule 3.1348(a).)

Here, Plaintiff provides no evidence that he has responded to Defendants' form interrogatories or request for production of documents. Plaintiff's proof of service of his responses to Defendants' request for admissions shows that the responses were untimely. Accordingly, sanctions are awarded against Plaintiff and in favor of Defendants, in the amount of $560, to be paid to Miller & Ayala, LLP, within 30 days of the clerk's mailing of this order.

Pursuant to California Rules of Court, rule 3.1312(a), and Code of Civil Procedure section 1019.5, subdivision (a), no further written order is necessary. The minute order adopting this tentative ruling will serve as the order of the court and service by the clerk will constitute notice of the order.

Tentative Ruling
Issued By: JYH on 09/07/16
(Judge's initials) (Date)

(20) **Tentative Ruling**

Re: ***Xiong et al. v. JH Family Limited Partnership, et al.***, Superior Court Case No. 15CECG01856

Hearing Date: September 13, 2016 (Dept. 402)
If oral argument is requested by 4 p.m. 9/7/16, it will be held on the above date at 3:30 p.m.

Motion: Defendants' Motion for Summary Judgment

Tentative Ruling:

To grant summary judgment of Plaintiffs' Complaint in favor of defendants JHS Family Limited Partnership, JCH Family Limited Partnership, DBH Family Limited Partnership and JD Home Rentals. (Code Civ. Proc. § 437c(c).) Prevailing parties are directed to submit to this court, within 5 days of service of the minute order, a proposed judgment consistent with the court's summary judgment order.

Explanation:

Plaintiffs' complaint alleges that they were tenants at defendants' apartment building, defendants carelessly and negligently caused a fire on the premises. Plaintiffs allege that all defendants negligently owned, maintained, managed and operated the premises.

While Defendants owned the property, the evidence shows that Plaintiffs controlled the property where the fire originated. While the cause of the fire was undetermined, it originated on the landing/porch of Plaintiffs' unit, which was used and controlled solely by Plaintiffs and apparently used for storage. (UMF 4-15.)

To prevail on a claim for premises liability, Plaintiffs must demonstrate that Defendants owed Plaintiffs a duty of care, breached that duty of care, and that said breach was a substantial factor in causing Plaintiffs' injuries. (*Saelzler v. Advanced Group 400* (2001) 25 Cal.4th 763, 772.)

A defendant cannot be held liable for the defective or dangerous conditions of property which it did not own, possess, or control and an out of possession owner is only obligated to conduct reasonable inspections in an effort to avoid dangerous conditions at the time a lease is executed. (*Whitney's by the Beach v. Superior Court* (1970) 3 Cal.App.3d 258, 269; *Brantley v. Pisaro* (1996) 42 Cal.App.4th 1591.) While Defendants owned the premises, control is a fundamental requirement for ascribing liability. (*Preston v. Goldman* (1986) 42 Cal.3d 108, 119.) Possession is equated with occupancy plus control. Control dominates over title. The crucial element is control. (*Low v. City of Sacramento* (1970) 7 Cal.App.3d 826, 831.)

Since the evidence shows that Plaintiffs alone had possession, occupancy, and control of the landing at the subject property, Plaintiffs cannot establish the element of control on the part of Defendants.

The second necessary element of Plaintiffs' premises liability claim is that Defendants were negligent in its use of the property. Negligence requires a showing of duty, breach, causation, and damages. (See *McIntyre v. Colonies-Pacific, LLC* (2014) 28 Cal.App.4th 664, 671.) This same evidence also negates the first three elements of negligence.

Pursuant to Cal. Rules of Court, Rule 3.1312(a) and Code Civ. Proc. § 1019.5(a), no further written order is necessary. The minute order adopting this tentative ruling will serve as the order of the court and service by the clerk will constitute notice of the order.

Tentative Ruling
Issued By: JYH on 09/07/16
(Judge's initials) (Date)

Tentative Rulings for Department 403

Tentative Rulings for Department 501

03

Tentative Ruling

Re: ***Minjares v. City of Fresno***
Case No. 15 CE CG 01247

Hearing Date: September 8th, 2016 (Dept. 501)

Motion: Defendants' Motion to Compel Production of Documents Re: Financial Responsibility and Request for Sanctions

Tentative Ruling:

To deny defendants' motion to compel plaintiff to produce documents showing financial responsibility, and the defendants' request for sanctions. (Code Civ. Proc. § 2031.300; 2031.310; 2023.030.)

In the event oral argument is requested it will be held on Tuesday, September 13, 2016 at 3:30 in Dept. 501.

Explanation:

Defendants' motion is confusing. Defendants claim that they are requesting an order compelling plaintiff to produce documents to prove that he had insurance at the time of the accident, but it is unclear which discovery request or requests the defendants are seeking to compel. It is also impossible to determine whether defendants want to compel initial or further responses to the discovery requests. Defense counsel cites to Code of Civil Procedure sections 2031.300 and 2023.010, and the notice of motion refers to compelling production of documents, which implies that defendants are seeking compel initial responses to document production requests. However, the points and authorities brief spends considerable amounts of time discussing plaintiff's responses to form interrogatories, as well as the various depositions that defense counsel has taken, in addition to several different document production requests. Therefore, it is unclear exactly which discovery requests defendants are seeking to compel.

Also, since it appears that plaintiff did in fact provide timely responses to each of the cited interrogatories and document requests, it appears that defendants are seeking to compel further responses to some or all of the requests. Yet defendants have not provided a separate statement with regard to the specific requests that they are seeking to compel, nor does defense counsel address any objections that have been raised or attempt to show that the responses are not in compliance with the Discovery Act. Thus, if defendants are seeking to compel further responses, they have not complied with Rule of Court 3.1345, which requires a separate statement addressing all of the disputed discovery responses, and the reasons why a further

response should be compelled. Therefore, the motion to compel is procedurally improper as well as substantively incorrect, and the court intends to deny the motion.

Moreover, the court intends to deny the request for monetary and other sanctions. Since the court must deny the underlying motion, there is no basis for any sanctions against plaintiff. In any event, the defendants' request for issue, evidence or terminating sanctions is improper, since plaintiff has not disobeyed any orders compelling him to respond to discovery. (Code Civ. Proc. § 2031.310, subd. (i); *Ruvalcaba v. Government Employees Ins. Co.* (1990) 222 Cal.App.3d 1579, 1580-1581; *Milekowsky v. Tenet Healthsystem* (2005) 128 Cal.App.4th 262, 276.) Therefore, the court will not grant the requested additional sanctions against plaintiff.

Finally, the court intends to grant plaintiff's request for sanctions against defendants for the cost of opposing the present motion. (Code Civ. Proc. § 2031.310, subd. (h).) However, the court will reduce the amount of sanctions awarded to a more reasonable number. Plaintiff seeks $2,750 in attorney's fees based on 11 hours of attorney time billed at $250 per hour. Yet this amount is excessive considering the relatively simple nature of the motion. The court intends to award sanctions of $750 based on three hours of attorney time billed at $250 per hour.

Pursuant to CRC 3.1312 and CCP §1019.5(a), no further written order is necessary. The minute order adopting this tentative ruling will serve as the order of the court and service by the clerk will constitute notice of the order.

Tentative Ruling
Issued By: MWS on 09/06/16
(Judge's initials) (Date)

(5)

Tentative Ruling

Re: ***Conner et al. v. Northside Church; National Union Fire Insurance Company of Pittsburgh, PA, Intervener***
Superior Court Case No. 15 CECG 01037

Hearing Date: September 8, 2016 (**Dept. 501**)

Motion: By Defendant to compel Plaintiff's answers pursuant to CCP § 2025.480

Tentative Ruling:

To deny the motion.

In the event oral argument is requested it will be held on Tuesday, September 13, 2016 at 3:30 in Dept. 501.

Explanation:

Pre-requisites

The "meet and confer" requirement has been met by correspondence between the parties. See Exhibit E attached to the Declaration of DeMaria. A Separate Statement of the questions and answers in dispute was filed as required by CRC Rule 3.1345(a), (c). A certified copy of the transcript was lodged on September 1, 2016, over 5 days before the hearing as required by CCP § 2025.480(h).

Defendant requests judicial notice of the Complaint, the pending criminal charges filed in Fresno County Superior Court as Case No. F10902026 and the Defendant's Memorandum of Points and Authorities filed in support of its motion to compel compliance with a deposition subpoena served on Larry Langford, a psychologist identified by Shann Conner as a treating therapist. The request will be granted pursuant to Evidence Code § 452(d)(1).

Merits

First, it appears that the motion is not timely. CCP § 2025.480(b) mandates that the motion be made "no later than 60 days after the completion of the record of deposition..." Here, the deposition was taken on June 1, 2016. The motion was filed on August 8, 2016. This is 68 days after the taking of deposition. Nothing is stated in the Declaration of DeMaria regarding when the record was completed.

Second, the objection was made by Plaintiff Michael Conner on grounds of the privilege against self-incrimination. See Plaintiff's Deposition at page 100 lines 18-25; 101-105 attached as Exhibit D to the Declaration of DeMaria. Yet, the case law cited in

the Memorandum of Points and Authorities addresses the waiver of privacy. This is not the same ground.

There is scant civil authority in the area of the area of the privilege against self-incrimination. The case of *Fremont Indemnity Co. v. Sup.Ct. (Sharif)* (1982) 137 Cal.App.3d 554 holds that the commencement of a lawsuit waives the privilege against self-incrimination as to factual issues tendered by the complaint. Id. at 557. In that case, the plaintiff brought suit to collect on his fire insurance after his restaurant burned down. But, he refused to answer discovery requests because he was under indictment for arson of the restaurant.

The case at bench does not involve the same scenario. Plaintiff Michael Conner is suing for damages suffered in a 30 foot from Defendant's attic. See Complaint filed on April 1, 2015. In addition, the criminal charges were filed three years before accident. See Request for Judicial Notice No. 2.

Third, Defendant also discusses the waiver of a right to privacy on a claim for "loss of consortium." But, only Plaintiff Shann Conner can claim "loss of consortium." See *Vanhooser v. Superior Court* (2012) 206 Cal.App.4th 921, 927. Notably, she has **not** been deposed. Whether she can be compelled to answer on these grounds is not ripe for determination. Therefore, the motion will be denied.

Pursuant to California Rules of Court, rule 3.1312(a) and Code of Civil Procedure section 1019.5, subd. (a), no further written order is necessary. The minute order adopting this tentative ruling will serve as the order of the court and service by the clerk will constitute notice of the order.

Tentative Ruling
Issued By: MWS on 09/07/16
(Judge's initials) (Date)

(28) **Tentative Ruling**

Re: ***Etchison v. Mason***

Case No. 16CECG00974

Hearing Date: September 8, 2016 (Dept. 501)

Motion: By Plaintiff for leave to file Second Amended Complaint

Tentative Ruling:

To grant the motion.

Plaintiff shall file and serve the Second Amended Complaint within ten court days of this order.

In the event oral argument is requested it will be held on Tuesday, September 13, 2016 at 3:30 in Dept. 501.

Explanation:

The Court notes that no opposition or objection appears to have been filed regarding this motion.

Plaintiff has filed the appropriate declaration in support of its motion for leave to file an amended complaint. (*Nestle v. Santa Monica* (1972) 6 Cal.3d 920, 939.) A plaintiff must also attach a declaration specifying "(1) the effect of the amendment; (2) why the amendment is necessary and proper; (3) when the facts giving rise to the amended allegations were discovered; and (4) the reasons why the request for amendment was not made earlier." (Cal. Rule of Ct. 3.1324, subdivision (b).).

Therefore, the motion for leave to file the Second Amended Complaint is granted and Plaintiff shall file and serve the Second Amended Complaint within ten court days of this order.

Pursuant to California Rules of Court, rule 3.1312, subdivision (a), and Code of Civil Procedure section 1019.5, subdivision (a), no further written order is necessary. The minute order adopting this tentative ruling will serve as the order of the court and service by the clerk will constitute notice of the order.

Tentative Ruling
Issued By: MWS on 09/07/16
(Judge's initials) (Date)

Tentative Rulings for Department 502

03 **Tentative Ruling**

Re: ***Pollock v. Kaiser Foundation Hospitals***
Case No. 14 CE CG 01347

Hearing Date: September 8th, 2016 (Dept. 502)

Motion: Defendant's Petition to Confirm Arbitration

Tentative Ruling:

To grant the defendant's petition to confirm the arbitration award and to enter judgment in conformity with the arbitrator's decision. (Code Civ. Proc. § 1285, *et seq*.)

In the event oral argument is requested it will be held on Tuesday, September 13, 2016 at 3:30 in Dept. 502.

Explanation:

"Any party to an arbitration in which an award has been made may petition the court to confirm, correct or vacate the award. The petition shall name as respondents all parties to the arbitration and may name as respondents any other persons bound by the arbitration award." (Code Civ. Proc., § 1285.)

"If a petition or response under this chapter is duly served and filed, the court shall confirm the award as made, whether rendered in this state or another state, unless in accordance with this chapter it corrects the award and confirms it as corrected, vacates the award or dismisses the proceeding." (Code Civ. Proc., § 1286.)

Here, defendant is entitled to have the arbitration award confirmed, as the parties stipulated to arbitrate the case and the arbitrator granted summary judgment in favor of defendant. Plaintiff has not filed opposition or made any attempt to show that the award was legally defective or incorrect.

Also, defendant has now shown that it gave proper notice of the petition and the hearing date to plaintiff. Service was on August 4th, 2016, so plaintiff had plenty of time to file opposition if she wished to do so. However, no opposition to the petition has been filed. Therefore, it appears that plaintiff has no objections to the petition to confirm the arbitration award, and the court intends to grant the petition, confirm the award, and enter judgment thereon.

Pursuant to CRC 3.1312 and CCP §1019.5(a), no further written order is necessary. The minute order adopting this tentative ruling will serve as the order of the court and service by the clerk will constitute notice of the order.

Tentative Ruling
Issued By: DSB on 09/06/16
(Judge's initials) (Date)

(5)

Tentative Ruling

Re: ***Ciolkosz v. West Acres Shopping Center and Chili Night Indian Restaurant et al.***
Superior Court Case No. 15 CECG 00048

Hearing Date: September 8, 2016 (**Dept. 502**)

Motions: Summary judgment, or in the alternative, summary adjudication of the claim for punitive damages by each Defendant

Tentative Ruling:

To grant all requests for judicial notice pursuant to Evidence Code § 452(d)(1).

To grant the motion of Defendant Chili Nights. It has met its burden of proof and the Plaintiff has not met its burden in opposition. See CCP § 437c(p)(2).

To deny the motion of Defendant West Acres, LLC. It has not met its burden of proof pursuant to CCP § 437c(p)(2). As a result, it is not necessary to examine the opposition, the reply and the objections. See *Consumer Cause, Inc. v. SmileCare* (2001) 91 Cal.App.4th 454, 468.

To grant the motion of Defendant Sanger Fence Co. It has met its burden of proof and the Plaintiff has not met its burden in opposition. See CCP § 437c(p)(2).

The prevailing parties are directed to submit to this court, within 5 days of service of the minute order, a proposed judgment consistent with the court's summary judgment order.

In the event oral argument is requested it will be held on Tuesday, September 13, 2016 at 3:30 in Dept. 502.

Explanation:

Motion by Defendant Chili Nights

Judicial Council of California Civil Jury Instruction [CACI] No.1000 "Premises Liability—Essential Factual Elements" states:

[*Name of plaintiff*] claims that [he/she] was harmed because of the way [*name of defendant*] managed [his/her/its] property. To establish this claim, [*name of plaintiff*] must prove all of the following:

1. That [*name of defendant*] [owned/leased/occupied/controlled] the property;

2. That [*name of defendant*] was negligent in the **use or maintenance** of the property;

3. That [*name of plaintiff*] was harmed; and

4. That [*name of defendant*]'s negligence was a substantial factor in causing [*name of plaintiff*]'s harm.

"[T]he duty to take affirmative action for the protection of individuals coming upon the land is grounded in the possession of the premises and the attendant right to control and manage the premises." [*Sprecher v. Adamson Companies* (1981) 30 Cal.3d 358, 368.]

The owner of the restaurant, Gurdip Singh Sangha submits his Declaration in support of the motion. He states that he rents the property in order to operate his restaurant. He further states that pursuant to the terms of the lease, he was "not responsible for maintaining the roof of the shopping center" and, accordingly, he has never undertaken the responsibility to repair, inspect, or maintain the roof." See Declaration of Sangha at ¶¶ 2-3 and Exhibit A attached thereto consisting the Lease Agreement. Finally, he states that he "had no involvement with the placement of razor wire or the access roof cage/gate on the roof." Id. at ¶ 4. The Defendant has met his burden of proof pursuant to CCP § 437c(p)(2). There is no need to address the case of *Tverberg v. Fillner Const., Inc.* (2010) 49 Cal.4th 518.

In opposition, the Plaintiff submits no evidence to show that this Defendant "maintained" the roof of the building or was involved in the decision to install razor wire. See Appendix of Evidence in Opposition filed on August 25, 2016. In fact, Plaintiff's own Declaration indicates the opposite. He states at ¶ 8: "Chili Nights did not know the combination to the lock that was on the cage that allowed access to the roof. West Acres person was contacted. He provided the combination to me and the Chili Nights manager." Obviously, if the moving Defendant was not provided with the combination to the lock, it neither "owned, possessed or controlled" the roof. See *Alcaraz*, supra. Therefore, Plaintiff has not met his burden of proof pursuant to CCP § 437c(p)(2). The motion for summary judgment brought by Defendant Chili Nights will be granted. There is no need to consider the reply.

Motion by Defendant West Acres

Negligence Cause of Action

Defendant claims that it owed no duty to the Plaintiff under the holding of the case of *Tverberg v. Fillner Const., Inc.* (2010) 49 Cal.4th 518. In this case, Defendant Fillner, a general contractor was employed to build a metal canopy over fuel pumping units. Fillner hired Lane Supply as a subcontractor. Lane hired sub-subcontractor Perry Construction Company. Perry employed Tverberg, as an independent contractor to act as foreman of Perry's two-man crew.

In fulfillment of the contract, Fillner employed subcontractor Alexander Concrete Company to set up eight bollards to prevent vehicles from colliding with the fuel

dispensers. Alexander dug eight holes for the bollard footings: each was four feet wide and four feet deep. Each hole was denoted with stakes and safety ribbon. Tverberg asked the "lead man" for Fillner to cover the holes with large metal plates that were on-site, but the "lead man" said he did not have the necessary equipment. However, he had his crew use a tractor to flatten dirt that was piled around the holes. Tverberg himself removed three or four stakes that were marking the edges of some of the bollard holes.

The next day, Tverberg began working on the canopy and again asked the "lead man" to cover the holes, but the lead man did not do so. A little while later, as Tverberg was walking from his truck toward the canopy, he fell into a bollard hole and was injured. He sued Fillner and sub-subcontractor Perry for physical and mental injuries and alleged negligence and premises liability.

The trial court granted summary judgment for Fillner on the ground that the plaintiff, an independent contractor, could not hold the general contractor *vicariously* liable under the "peculiar risk" exception. The trial court also rebuffed the assertion that Fillner could be held *directly* liable for failing to cover the bollard holes given that plaintiff should have been aware of the danger but did not refuse to work around them and defendant had never promised to cover the holes.

On appeal, plaintiff argued for the first time that *Privette* did not bar him from holding the general contractor vicariously liable on a theory of peculiar risk. The Court of Appeal reversed the trial court's summary judgment for defendant general contractor on the ground that *Privette* does not apply when the person injured is the independent contractor **himself** because, unlike an employee, the independent contractor is **not covered** by mandatory workers compensation coverage.

The Supreme Court granted review. It noted that *Privette* explained that the term "peculiar risk" derives from the Restatement 2d of Torts: there is a special or recognizable danger inherent to the work itself against which a reasonable person would recognize the necessity of taking special precautions. The doctrine of peculiar risk is an exception to the common law rule that a person hiring an independent contractor to perform inherently dangerous work is generally not liable to third parties for injuries resulting from the work. The rationale was that a landowner who chose to undertake inherently dangerous activity on his land should not escape liability for injuries to others simply by hiring an independent contractor to do the work.

Privette held that an independent contractor's injured employee cannot use the doctrine of peculiar risk to recover damages from the hirer of the independent contractor for injuries compensable under workers compensation insurance, the cost of which is generally included in the contract price for the hired work. *But the existence of workers compensation coverage is not relevant* in determining whether a hirer should incur vicarious liability for a workplace injury to an independent contractor who was hired by a sub-subcontractor to do inherently dangerous work. An independent contractor, unlike any other employee, has authority to determine how the work is to be performed and a responsibility to see that it is performed safely. A hired independent contractor who suffers injury from risks inherently in the work after having

assumed responsibility for all safety precautions is not a "hapless victim" of somebody else's misconduct. As a result, the Supreme Court reversed and remanded.

Notably, on remand, the trial court again granted summary judgment in favor of Fillner. On appeal, the First District Court of Appeal held that a trial issue of material fact existed as to whether the general contractor retained control over the jobsite in such a manner that it affirmatively contributed to injuries. It reversed and remanded. See *Tverberg v. Fillner Const., Inc.* (2012) 202 Cal.App.4th 1439.

In the case at bench, West Acres strains to equate the facts of the instant case with the facts in *Tverberg*, supra. See Defendant's Memorandum of Points and Authorities at pages 14-15. But, they are not the same. Plaintiff was hired to fix a walk-in freezer. He went up to the roof in order to look at the compressor. He was not repairing the roof. See Facts Nos. 2 and 6 of the Defendant's Separate Statement.

As a matter of law, the pleadings determine what issues are material in a summary judgment motion. See *Nieto v. Blue Shield of Calif. Life & Health Ins. Co*. (2010) 181 Cal.App.4th 60, 74. The moving party must show that the undisputed facts, when **applied to the issues framed by the pleadings,** entitle the moving party to judgment. [*Juge v. County of Sacramento* (1993) 12 Cal.App.4th 59, 66]

Importantly, Plaintiff alleged in the Third Amended Complaint at ¶ 10.b. that Defendants "failed to replace the old, raggedy ladder that posed serious risk for anyone who needed to enter or exit the premises (at the roof)"; and ¶ 10.c. that Defendants "failed to install grips that would help anyone entering/exiting the cage have something to hold on to". Plaintiff also alleged at ¶ 13 that "the dangerous conditions that existed because of the old, raggedy ladder caused immediate imbalance. With zero traction and no handles to grab on to, [he] slipped on the last step of the ladder. He tried to gain his balance. While gaining his balance, his arm was slashed by the razor blades that were improperly placed."

Yet, the Defendant's Separate Statement does not address the condition of the access ladder. Although Fact No. 20 mentions that the Plaintiff was aware tar can make steps slippery on hot days, this misstates Plaintiff's testimony. He was speaking in general about the experience of other workers on jobs. See page 102 at lines 12-14 of Exhibit 1 attached to the Declaration of Hagar.

In addition, there is no evidence that there was any tar on the "steps" or that tar on the "steps" caused Plaintiff to fall. In fact, there were no steps per se. Instead, the ladder from the cage to the roof consisted of **metal rungs**. See photo attached to Declaration of Classen as Exhibit B. The photo also shows that anyone descending the rungs would be within arms' length of the razor wire. In addition, barbed wire was attached directly to the frame of the ladder. Id. The protection afforded by the mesh panels did not surround the ladder. Plaintiff made the same observation about the wire in his deposition testimony. See page 54 lines 11-20 of Plaintiff's deposition attached as Exhibit 1 to the Declaration of Hagar.

Finally, the Defendant's reliance upon cases that deal with **vicarious liability** is misplaced. Instead, the Third Amended Complaint (while not a model pleading) indicates that Plaintiff is alleging negligence directly on the part of West Acres. A direct negligence action against the hirer may be imposed without "running afoul" of *Privette* and its progeny. See *McKown v. Wal-Mart Stores, Inc.* (2002) 27 Cal.4th 219. In that case, the Supreme Court held that: (1) a hirer is liable to an employee of an independent contractor insofar as the hirer's provision of unsafe equipment affirmatively contributes to the employee's injury, and (2) store, by requesting that contractor, "whenever possible," use store's forklifts, was liable to contractor's injured employee, based on provision of unsafe equipment. Here, the access ladder was "provided" by West Acres. See Fact No. 8 of the Defendant's Separate Statement.

It has been determined that "[t]here is no obligation on the opposing party ... to establish anything by affidavit unless and until the moving party has by affidavit stated facts establishing *every element* ... necessary to sustain a judgment in his favor." See *Consumer Cause, Inc. v. SmileCare* (2001) 91 Cal.App.4th 454, 468. Given that the moving party has not met its burden pursuant to CCP § 437c(p)(2), it is not necessary to examine the opposition, the reply or the objections. The motion for summary judgment will be denied. As a matter of law, it owed a duty to the Plaintiff. A triable issue of material fact exists as to whether that duty was breached.

Claim for Punitive Damages

As for the motion for summary adjudication of the claim for punitive damages, in general, a defendant may seek summary adjudication either that:

- some element of the tort claim cannot be established; or
- defendants' conduct does not constitute "oppression, malice or fraud" (as defined by Civ.C. § 3294(c)); or
- plaintiff's proof is not "clear and convincing" as required by Civ.C. § 3294(a).

In the instant case, West Acres moves for summary adjudication on the grounds that the element of causation cannot be established and on the grounds that its conduct does not constitute "oppression, malice or fraud." As for the element of causation, Defendant's own evidence creates a triable issue of material fact as whether it was directly negligent in the manner in which the razor wire was installed. See page 54 lines 11-20 of Plaintiff's deposition attached as Exhibit 1 to the Declaration of Hagar. See photo attached as Exhibit B to the Declaration of Classen.

As for its motives, West Acres argues that installed the razor wire to stop vandalism and theft at its premises. Further, it submits that it had obtained approval from the County prior to its installation. See Declaration of Classen.

But, Defendant has addressed only one prong of Civil Code § 3294(c). "Malice" means conduct *intended* by the defendant *to cause injury* to the plaintiff **or** *despicable conduct* that is carried on by the defendant with a *willful and conscious disregard* for

the rights or safety of others. [Civ.C. § 3294(c)(1)] In fact, Plaintiff alleged that Defendant West Acres acted with "a willful and conscious disregard for the safety of others" in pleading his claim for punitive damages. See Third Amended Complaint at ¶ 26.

But, the Declaration of Classen does not address this allegation. Instead, it focuses on the motive for installation. See Declaration at ¶¶ 3, 4, and 12. As for the request to the County for installation and its subsequent approval, Defendant cites no authority as to how this bears upon the claim for punitive damages. Therefore, the motion for summary adjudication should be denied. The Defendant has not met its burden of proof pursuant to CCP § 437c(p)(2).

It has been determined that "[t]here is no obligation on the opposing party ... to establish anything by affidavit unless and until the moving party has by affidavit stated facts establishing *every element* ... necessary to sustain a judgment in his favor." See *Consumer Cause, Inc. v. SmileCare* (2001) 91 Cal.App.4th 454, 468. Given that the moving party has not met its burden, it is not necessary to examine the opposition, the reply or the objections.

Motion by Defendant Sanger Fence

Affirmative Defense--Doctrine of Completion and Acceptance

In the case of *Kolburn v. P.J. Walker Co*. (1940) 38 Cal. App. 2d 545, 101 P.2d 747, defendant Wm. P. Neil Company constructed a building in 1927. It used cross-grained lumber in the rafters. Ten years later, in 1937, plaintiff Kolburn fell through the roof. The court held that the contractor was not liable, even assuming negligence. The court said that the law was well established in California that, where the work of an independent contractor is completed and accepted by the owner, the contractor is not liable to a third person for damage because of negligent construction.

The Supreme Court revisited the premise in *Dow v. Holly Mfg. Co.* (1958) 49 Cal. 2d 720, 321 P.2d 736. It disapproved cases holding that the responsibility of a contractor was terminated once the structure was completed and accepted by the owner, and announced that, in the future, California courts, like most courts across the nation, would hold contractors responsible for injuries caused by their negligence, regardless of whether the structure had been completed and accepted by the owner.

But, in the case of *Shurpin v. Elmhirst* (1983) 148 Cal. App. 3d 94, the Second District stated: "Generally, a contractor is not liable for injuries that occur after the performance of a contract and the acceptance of the work by the employer." In *Sanchez v. Swinerton & Walberg Co*. (1996) 47 Cal. App. 4th 1461, the trial court granted the motions of defendants, a general contractor and a concrete subcontractor for summary judgment where the plaintiff slipped and fell at a newspaper production facility that had been completed and accepted by the owner. The Second District affirmed.

There, the plaintiff had climbed up a flight of stairs, and walked across a landing into an office. After taking three or four steps inside the building, he slipped and fell. The concrete landing sloped down toward the building entrance and, during rainy periods, water collected on the landing and tended to migrate into the building. The owner had noticed the condition but had not brought this fact to the attention of the contractor or subcontractor. The appellate court determined that a contractor who constructs a defective facility, causing injury to the plaintiff, is not liable to the plaintiff if the defect was patent after the building project was completed and accepted by the owner. It noted that the rule was stated by the California Supreme Court as early as 1857. By accepting a building project and using it, the owner assumes responsibility for its sufficiency. At that point, the liability of the contractors has ceased, and the liability of the owners has commenced. But, where injuries are caused by a latent defect, the contractor remains liable. Evidence that the standing water was obvious and created a danger was uncontradicted. Accord *Jones v. P.S. Development Co., Inc.* (2008) 166 Cal.App.4th 707 and Neiman v. Leo A. Daly Co. (2012) 210 Cal.App.4th 962.

In the instant case, Defendant Renteria dba Sanger Fence states that on March 27, 2013, he submitted a proposal at the request of West Acres to install razor wire on the roof. Prior to its installation, West Acres obtained county approval. Renteria installed the wire where West Acres directed. On April 3, 2013, Sanger Fence submitted the bill to West Acres. See Declaration of Renteria at ¶¶ 5-7 and 9 and Exhibits A and B attached thereto. Defendant has met its burden pursuant to CCP § 437c(p)(2).

In opposition, Plaintiff does not squarely address the doctrine. Instead, he cites to principles of ordinary negligence and argues that the cases cited by the Defendant are old and that the doctrine is disfavored. See Plaintiff's Memorandum of Points and Authorities in opposition at pages 4-13. But, Miller & Starr acknowledge the doctrine and state that it has not been abrogated. See 6 California Real Estate § 19:57 (4th Ed.) citing *Jones v. P.S. Development Co., Inc.*, (2008) 166 Cal. App. 4th 707, 712 (disapproved of on other grounds by, *Reid v. Google, Inc.*, (2010) 50 Cal. 4th 512 (emphasis added). Therefore, the Plaintiff has not met his burden pursuant to CCP § 437c(p)(2). The motion will be granted. There is no need to consider Defendant's reply or objections.

Pursuant to California Rules of Court, rule 3.1312(a) and Code of Civil Procedure section 1019.5, subd. (a), no further written order is necessary. The minute order adopting this tentative ruling will serve as the order of the court and service by the clerk will constitute notice of the order.

Tentative Ruling
Issued By: DSB on 09/06/16
(Judge's initials) (Date)

Tentative Rulings for Department 503

(28) **Tentative Ruling**

Re: ***Helmsman Management Services, Inc. v. Ventura, et al.***

Case No. 13CECG02309

Hearing Date: September 8, 2016 (Dept. 503)

Motion: By Plaintiff for Order to Consider Request for Default Judgment Under Labor Code §3852, et seq.

Tentative Ruling:

To deny the motion.

NOTE- In the event that oral argument is requested it will be heard at 3:30 p.m. on September 15, 2016 in Department 503.

Explanation:

By this motion, Plaintiff effectively seeks reconsideration of the Court's rulings on May 8, 2014, May 14, 2015 and May 5, 2016.

Any motion for reconsideration must be made within 10 days after service upon the party of written notice of entry of the order and based upon new or different facts, circumstances, or law. (Code Civ.Proc. §1008, subdivision (a).) It has been more than ten days since even the latest Court's decision on these matters.

Furthermore, even if the motion were timely, Plaintiff has pointed to no "new or different facts, circumstances or law" that would make such reconsideration appropriate.

Moreover, the cases presented by Plaintiff do not contradict this Court's prior rulings.

Fireman's Fund Ins. Co. v. Maryland Cas. Co. (1998) 65 Cal.App.4th 1279, 1292 stands for the proposition that subrogation is its own cause of action. This Court ruled on May 8, 2014, that, therefore, it is not a cause of action for personal injury and, as a result, Code of Civil Procedure §425.10, subdivision (b) (requiring the filing of a statement of damages) did not apply.

In the papers on the instant motion, Plaintiff cites to *County of San Diego v. Sanfax Corp.* (1977) 19 Cal.3d 862, 875 for the proposition that a claim under Labor Code §3853 is a tort action and that substantively, "as well as procedurally, employer

and employee actions are interchangeable: regardless of who brings an action, it is essentially the same lawsuit." (*Id.*) However, *County of San Diego* was concerned with what statute of limitations applied to a claim under Labor Code §3853, and not to whether such a claim was or was not one for personal injury for purposes of the damages requirements of Code of Civil Procedure §425.10, subdivision (b).

In any event, Plaintiff's motion has not addressed the separate reason for the rejection as stated in the Court's decision of May 14, 2015, that the Complaint does not allege the required elements for subrogation. (*See Fireman's Fund, supra,* 65 Cal.App.4th at 1292 (listing elements).) That the Complaint does not adequately state a cause of action is an independent and separate ground for denying Plaintiff's request for entry of default judgment. (*Molen v. Friedman* (1998) 64 Cal.App. 4th 1149, 1153-54.)

For all of these reasons, the motion is denied.

Pursuant to California Rules of Court, rule 3.1312, subdivision (a), and Code of Civil Procedure section 1019.5, subdivision (a), no further written order is necessary. The minute order adopting this tentative ruling will serve as the order of the court and service by the clerk will constitute notice of the order.

Tentative Ruling
Issued By: A.M. Simpson on 09/07/16
(Judge's initials) (Date)